



March 15, 2001

Ms. Marianne Landers Banks
City Attorney
City of Georgetown
P.O. Box 409
Georgetown, Texas 78627-0409

OR2001-1033

Dear Ms. Banks:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144989.

The City of Georgetown (the "city") received a request for information relating to municipal moratoriums. You have released some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.131 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

We first note that one of the submitted documents, Exhibit C, is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). Thus, a completed report is subject to required public disclosure under section 552.022(a)(1), unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. As you do not raise section 552.108, section 552.022(a)(1) requires the release of Exhibit C, unless that document is expressly confidential under other law.

You claim that Exhibit C constitutes a privileged attorney-client communication. The Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether Exhibit C is confidential under Rule 503. Rule 503(b)(1) provides as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is “confidential” under Rule 503 if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* TEX. R. EVID. 503(a)(5).

Thus, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ). We have carefully reviewed Exhibit C and conclude that it is confidential under Texas Rule of Evidence 503. Therefore, the city may withhold that document from the requestor.

You seek to withhold five other documents, marked as Exhibits B, D, E, F, and G, under section 552.107(1) of the Government Code, which protects information that comes within the attorney-client privilege. In Open Records Decision No. 574 (1990), this office concluded that section 552.107(1) excepts from disclosure only what Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct defines as “privileged information,” that is, either client confidences or the attorney’s legal advice or opinions; section 552.107(1) does not apply to all client information held by a governmental body’s attorney. *See* ORD 574 at 5. Section 552.107(1) does not protect purely factual information. *Id.* Thus, section 552.107(1) does not except from disclosure factual recounting of events or the documentation of calls made, meetings attended, and memos sent. *Id.* Upon careful review of the documents in question, we conclude that the city may withhold all of Exhibit G and parts of Exhibits B, D, E, and F under section 552.107(1).

You also seek to withhold Exhibits D, E, and F under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of section 552.111 is to protect advice, opinion, and recommendation used in the decisional process from public disclosure and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. -- San Antonio 1982, no writ); Open Records Decision No. 559 (1990). In Open Records Decision No. 615 (1993), this office reexamined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App. -- Austin 1992, no writ). We concluded that section 552.111 excepts from required public disclosure “only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body[.]” Open Records Decision No. 615 at 5-6; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169 (Tex. App. -- Austin 2001, no pet. h.). Section 552.111 generally does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. However, if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation that severance is impractical, factual matter also may be withheld. *See* Open Records Decision No. 313 (1982). We have marked information in Exhibits D, E, and F that the city may withhold under section 552.111.

Lastly, we address your claim that Exhibits D, E, and F contain economic development information that is excepted from disclosure under section 552.131 of the Government Code. Section 552.131 provides as follows:

- (a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

- (1) a trade secret of the business prospect; or
- (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

(c) After an agreement is made with the business prospect, this section does not except from [required public disclosure] information about a financial or other incentive being offered to the business prospect:

- (1) by the governmental body; or
- (2) by another person, if the financial or other incentive may directly or indirectly result in the expenditure of public funds by a governmental body or a reduction in revenue received by a governmental body from any source.

Gov't Code § 552.131. Thus, section 552.131(a) excepts from public disclosure only "trade secrets" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." In this regard, section 552.131 is co-extensive with section 552.110 of the Government Code, which excepts from disclosure "a trade secret obtained from a person" and "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" See Gov't Code § 552.110(a), (b); *see also* Open Records Decision Nos. 552 at 2-5 (1990) (trade secrets), 661 at 5-6 (1999) (commercial or financial information).

You seek to withhold information relating to an economic development project known as "the Rivery" under section 552.131. You have not demonstrated, however, that Exhibits D, E, or F contain any information relating to that project that constitutes either a trade secret obtained from a business prospect or commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov't Code § 552.131(a). Furthermore, you have not identified any information in Exhibits D, E, or F that relates to any financial or other incentive that the city is offering to a business prospect in connection with "the Rivery" project. *Id.* § 552.131(b). Therefore, we conclude that none of the information in Exhibits D, E, or F is excepted from disclosure under section 552.131.

In summary, Exhibit C is confidential under Texas Rule of Evidence 503. The city may withhold all of Exhibit G under section 552.107(1) of the Government Code and portions of Exhibits B, D, E, and F under sections 552.107(1) and 552.111. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

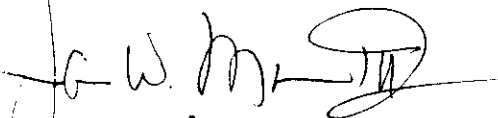
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J. W. Morris, III", with a stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 144989

Encl: Marked documents

cc: Mr. Carter Nelson
Austin American-Statesman
203 East Main
Round Rock, Texas 78664
(w/o enclosures)